FILED BY CLERK
JAN 11 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ROBERT EDWARD POWELL, Petitioner.	2 CA-CR 2010-0107-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20051696

Honorable Nanette M. Warner, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

John William Lovell
Tucson
Attorney for Petitioner

K E L L Y, Judge.

¶1 Petitioner Robert Powell seeks review of the trial court's order summarily dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. After a jury in his first trial failed to reach a verdict, Powell was tried by a second

jury and convicted of two counts of sexual assault and one count of kidnapping, all involving the same victim, R.L. We affirmed his convictions and sentences on appeal. *State v. Powell*, No. 2 CA-CR 2006-0129 (memorandum decision filed May 19, 2008). In our decision, we rejected Powell's argument that the court had erred in admitting evidence of a prior, uncharged, attempted sexual assault against J. *Id.*, ¶¶ 8-20. Because J. had died before Powell's trial, this other-act evidence was provided by Glenda G. She testified Powell and J. had been spending the night in her home when she heard J. scream, went to the room where J. and Powell were staying, and found them both naked. Glenda testified that J. showed her several bruises and other marks and told Glenda that Powell had tried to sexually assault her.

¶2 In his petition for post-conviction relief, Powell alleged (1) the state violated his due process rights, under the rule announced in *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose Glenda's misdemeanor conviction for false reporting to a police officer, because that evidence could have been used to impeach her credibility; (2) his trial counsel had been ineffective because he "fail[ed] to fully investigate [Glenda]'s prior criminal history" and thus had failed to discover this impeachment evidence; and (3) trial and appellate counsel were deficient in failing to develop arguments that Glenda's hearsay testimony violated his Sixth Amendment right of confrontation under the rule announced in *Crawford v. Washington*, 541 U.S. 36 (2004).[1]

[1]Powell acknowledged his trial counsel "argued briefly, in part, that evidence of [J.'s] assault was inadmissible under *Crawford* . . . ." He argued trial counsel was ineffective because he did not "fully research and develop" the argument and appellate counsel was ineffective because he did not raise a *Crawford* claim on appeal.

¶3 The trial court denied relief summarily after finding none of these claims were colorable. *See* Ariz. R. Crim. P. 32.6(c) ("court shall order the petition dismissed" if nonprecluded claims present no "material issue of fact or law which would entitle the defendant to relief"). In addressing Powell's claim that the prosecutor violated his due process rights by failing to disclose Glenda's criminal record, the court correctly noted the state's "obligation to reveal any potentially exculpatory material, including convictions of its witnesses," *see United States v. Bagley*, 473 U.S. 667, 676 (1985), and correctly concluded Glenda's "conviction for false reporting to law enforcement would have been admissible to impeach [her] credibility under Rule 609(a)[, Ariz. R. Evid.]," *see State v. Malloy*, 131 Ariz. 125, 127, 639 P.2d 315, 317-319 (1981). The court then stated, "Without evidence otherwise, the court assumes counsel, including the prosecutor, are acting ethically and that if the prosecutor had any information of [Glenda]'s convictions, she would have disclosed them."

¶4 The trial court further explained in its ruling that, to prevail on his claim of ineffective assistance of counsel, Powell was required to establish that his counsel's performance fell below an objectively reasonable professional standard and that this deficient performance was prejudicial to the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). The court then assumed, for the purpose of its Rule 32.6 review, that counsel's failure to investigate Glenda's criminal history had been deficient under *Strickland*, that further inquiry would have revealed Glenda's conviction for false reporting, and that this evidence would have been admitted for impeachment purposes. The court found,

however, that, even assuming counsel's performance had been deficient, Powell could not establish prejudice, because he could not show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The court found Powell's due process claim failed "for the same reason." It also rejected Powell's claim that counsel had been ineffective in failing to challenge Glenda's testimony as violating his confrontation rights, because, it found, such an argument would have lacked merit. *See State v. Aguilar*, 210 Ariz. 51, ¶¶ 10-11, 107 P.3d 377, 379 (App. 2005) (excited utterance heard by lay witness not "testimonial" under *Crawford*).

¶5 On review, Powell relies primarily on the arguments he raised below in contending the trial court "incorrectly decided important issues of law." He maintains the state's error in failing to disclose Glenda's conviction, and his counsel's error in failing to discover it, were "not harmless," and he is therefore entitled to a new trial. He also disputes the court's findings that the state "presented strong evidence of the sexual assaults committed by [Powell] against [R.L.]" and that the potential impeachment of Glenda, through evidence of her misdemeanor conviction, would not have "reduce[d] the effect of the State's evidence against [Powell] as to the assaults on [R.L.]."

¶6 We will not disturb a trial court's summary denial of post-conviction relief unless the court has abused its discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). Like the ultimate decision to grant or deny post-conviction relief, whether a claim is colorable and thus warrants an evidentiary hearing "is, to some extent, a

discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). We address the court's rulings in turn.

State's Failure to Disclose Impeachment Evidence

¶7 The trial court appears to have concluded that the state had an obligation to disclose evidence that might be used to impeach one of its witnesses only if the prosecutor had personal knowledge of that evidence. But a "prosecutor is responsible for 'any . . . evidence [favorable to the defense] known to the others acting on the government's behalf in the case, including the police.' [And t]hus . . . is charged with knowledge of [such] materials for purposes of *Brady v. Maryland*." *Strickler v. Greene*, 527 U.S. 263, 275 n.12 (1999) (citation omitted), *quoting Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (alteration added).

¶8 Nonetheless, we cannot say the trial court abused its discretion in finding Powell had failed to state a colorable claim of a *Brady* violation, because "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." *Kyles*, 514 U.S. at 436-37. Rather, a defendant's due process rights are violated only if the nondisclosed evidence was material to his defense. *Id.* Although Powell argues that the state's nondisclosure was "not harmless" error, the test for materiality, to determine whether a *Brady* violation has occurred, is not whether the nondisclosure "was harmless beyond a reasonable doubt" under the standard announced in *Chapman v. California*, 386 U.S. 18, 24 (1967). *Kyles*, 514 U.S. at 436. Instead, evidence favorable to the defense "is material, . . . 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of

the proceeding would have been different.'" *Kyles*, 514 U.S. at 433, *quoting Bagley*, 473 U.S. at 682. This is the same standard used to determine whether a defendant has been prejudiced by counsel's deficient performance. *Bagley*, 473 U.S. at 682 (adopting *Strickland* standard for prejudice to determine materiality under *Brady*). The court's ruling that Powell had failed to state a colorable claim of prejudice resulting from counsel's failure to investigate Glenda's criminal history therefore applies equally to his claim that the state's nondisclosure of that impeachment evidence constituted a violation under *Brady*.

Prejudice Resulting from Nondisclosure and/or Failure to Investigate

¶9 On review, Powell again asserts "there is a strong likelihood . . . [he] would have been acquitted" if Glenda's allegations that he had attempted similar assaults against another woman had been shown to be unreliable. As he did below, he cites the result in his first trial, in which the jury had failed to reach any verdicts, as support for his argument that the state lacked "overwhelming evidence" that he kidnapped and assaulted R.L. and his assertion that Glenda's testimony was "probably determinative" of the jury's guilty verdicts in his second trial.[2] He also refers to undisputed evidence that R.L. and Powell had been acquaintances and had spent the evening before the assaults drinking together, dancing, kissing, and fondling each other; that R.L. had walked Powell to his door before he directed her into his building and his apartment; that she had then, at Powell's insistence, instructed her ride to leave without her; and that she had not

[2]We note, however, that Glenda testified at both of Powell's trials, not just the second trial.

physically resisted Powell's advances and had complied with his demands, although she had told him repeatedly, "I don't want to do this." The state presented evidence including the testimony of a nurse who later examined R.L. and concluded she had suffered injuries "consistent with sexual assault."

¶10 In responding to these same arguments raised in Powell's petition for post-conviction relief, the trial court wrote:

> [Powell] fails to prove the second prong of *Strickland*. That prong requires that but for counsel's errors the result of the proceeding would have been different. In order to prevail in a claim for ineffective assistance of counsel, [Powell] must prove that counsel's deficient performance so prejudiced the defense that it deprived him of a fair trial. . . .
>
> . . . .
>
> [Powell] does not and cannot prove the reason the first jury failed to reach a verdict, and any supposition that it was only the evidence of the assault on [J.] that tipped the scales against him is speculative at best.
>
> The State presented strong evidence of the sexual assaults committed by [Powell] against [R.L.]. The fact that [Glenda] had a misdemeanor conviction with which she could have been impeached does not reduce the effect of the State's evidence against [Powell] as to the assaults on [R.L.]. It is speculation as to what if any weight the jury gave to [Glenda]'s testimony and the alleged prior acts between [Powell] and [J.].

¶11 Ordinarily, we would afford such findings considerable deference, because the trial court observed the presentation of evidence throughout Powell's trial and is in the best position to assess the potential effect of such impeachment evidence on the jury's verdict. But, because some of the statements in the court's ruling suggested it had relied on an incorrect standard for establishing prejudice under *Strickland*, we directed the state

to respond to Powell's petition for review to address this issue. In its response, the state maintains the standard employed by the court was correct and, after further review, we agree.

¶12 Although the trial court incorrectly stated that *Strickland* required Powell to show that "but for counsel's errors the result of the proceeding would have been different," it cites the correct standard elsewhere in its order, quoting *Strickland* as requiring only that a defendant establish a "reasonable probability" of a different result, had counsel not erred. This distinction is important, because "a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*." *Nix v. Whiteside*, 475 U.S. 157, 175 (1986); *see also Strickland*, 466 U.S. at 693. Similarly, the showing of materiality to establish constitutional error under *Brady* "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 433-34. And, although a petitioner's showing must be more than "mere speculation," *see State v. Rosario*, 195 Ariz. 264, ¶ 23, 987 P.2d 226, 230 (App. 1999), assessing the likelihood of a different outcome under the "reasonable probability" standard necessarily requires a court "'to speculate'" about the potential effect of counsel's error. *Sears v. Upton*, ____U.S.___, 130 S. Ct. 3259, 3265 n.8, 3266 (2010) (vacating denial of post-conviction relief to capital defendant where state court found it "impossible to know" effect of counsel's facially inadequate investigation of mitigating evidence; *Strickland* requires court "'to speculate' as to the effect of the new evidence").

¶13 Powell has not persuaded us the court abused its discretion. As suggested in *Kyles*, the relevant inquiry to determine if constitutional error resulted from the state's failure to disclose the impeachment evidence, or counsel's failure to discover it, is whether, had that evidence been introduced at Powell's trial, it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. In finding the impeachment evidence would "not [have] reduce[d] the effect of the State's evidence against [Powell] as to the assaults on [R.L.]," the court appears to have applied this correct standard. *See Strickland*, 466 U.S. at 695 (in assessing prejudice, courts "must consider the totality of the evidence before the judge or jury"); *cf. Woodford v. Visciotti*, 537 U.S. 19, 23-24 (2002) ("readiness to attribute error" based on imprecise statement of *Strickland* standard "is inconsistent with the presumption that state courts know and follow the law"). As we commented in our ruling on Powell's direct appeal, it appears the jury found R.L.'s testimony credible. *Powell*, No. 2 CA-CR 2006-0129, ¶ 37. This conclusion is buttressed by the fact that the jury not only found Powell guilty of the offenses charged but found, as an aggravating factor, that R.L. had suffered emotional harm as a result of those offenses.

Ineffective Assistance Based on Alleged *Crawford* Error

¶14 With respect to Powell's other claims of ineffective assistance of counsel, we adopt the trial court's ruling, which provides a thorough and correct analysis of the law as applied to the facts in this case. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when court correctly identifies and rules on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o

useful purpose would be served by this court[’s] rehashing the trial court’s correct ruling in a written decision”).

¶15 For the foregoing reasons, although we grant review, we deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge